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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 22, 24, 27 and 90

[WT Docket Nos. 06-150, 01-309, 03-264, 06-169, 96-86, 07-166, CC Docket No. 94,102, PS Docket No. 06-229; FCC 13-29]

Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; et al.

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration.

SUMMARY: The Memorandum Opinion and Order on Reconsideration (MO&O) denies or dismisses petitions seeking reconsideration of certain decisions made by the Commission in the 700 MHz Second Report and Order, relating to the 698-806 MHz Band, including decisions regarding performance requirements, the auction and competitive bidding rules, the open platform rules, public safety narrowband relocation procedures, and the decisions not to impose wholesale requirements, eligibility restrictions, and spectrum aggregation limits. This MO&O also dismisses as moot petitions for reconsideration of rules establishing a Public/Private Partnership between the Upper 700 MHz D Block (D Block) licensee and the Public Safety Broadband Licensee in the 763-768 MHz and 793-798 MHz bands.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Memorandum Opinion and Order on Reconsideration, WT Docket Nos. 06-150, 01-309, 03-264, 06-169, 96-86, 07-166, CC Docket No. 94,102, PS Docket No. 06-229; FCC 13-29, adopted February 28, 2013 and released March 1, 2013. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY-A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room, CY-B402, Washington, DC 20554. The full text may also be downloaded at: www.fcc.gov. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

I. INTRODUCTION

1. In this MO&O, the Commission addresses petitions that were filed seeking reconsideration of certain decisions made by the Commission in the 700 MHz Second Report and Order at 72 FR 48814, Aug. 24, 2007, relating to the 698-806 MHz Band (herein, the 700 MHz Band).

II. DISCUSSION

A. Performance Requirements

2. Below the Commission discusses the issues raised by petitioners with respect to the performance requirements that the Commission established in the 700 MHz Second Report and Order. After careful consideration of the arguments raised in the petitions for reconsideration, the Commission denies the requests to modify the existing performance requirements.

1. Geographic-Based Coverage Requirements for CMA and EA Licenses

3. Blooston Rural Carriers (Blooston), MetroPCS Communications, Inc. (MetroPCS), and Rural Telecommunications Group, Inc. (RTG) filed petitions for reconsideration challenging various aspects of the geographic-based performance requirements.

4. The Commission denies the petitioners' requests to alter the geographic-based coverage requirements. First, the Commission is unpersuaded by Blooston's arguments that a geographic-based performance requirement on CMA licensees (*i.e.* licensees in Lower 700 MHz B Block) is arbitrary and unworkable and should be supplemented with the option of meeting a population-based benchmark. The Commission provided reasonable justifications for its decision to adopt a geographic-based build-out requirement for CMA and EA licenses, and the Commission finds nothing in the record to persuade it to change this decision. The Commission particularly noted that:

[b]ecause [the Commission] adopt[s] smaller geographic license areas such as CMAs to facilitate the provision of service . . . in rural areas, [it] also adopt[s] performance requirements that are designed to ensure that such service is offered to consumers in these areas.

The Commission further found that:

the uniqueness of the 700 MHz spectrum justifies the use of geographic benchmarks

Blooston argues that the Commission arbitrarily discriminated against CMA licenses by providing population-based requirements on both EA and REAG licensees. In fact, the Commission imposed identical geographic-based requirements on EA and CMA licenses, and it reasonably justified its decision to adopt a different approach for the much larger REAG licenses. Blooston argues that for some licenses, meeting the geographic-based benchmarks will be impractical, and offers analysis of nine CMAs out of the 734 in Lower 700 MHz B Block. For specific cases of hardship, however, providers can seek waiver relief. Blooston offers no evidence demonstrating that a geographic-based benchmark is inherently impractical in the usual case.

5. Indeed, the results of the auction of Lower 700 MHz B Block licenses provide further support for the reasonableness of the Commission's geographic-based performance requirements. In the 700 MHz Second Report and Order, the Commission decided that, if those geographic-based requirements caused a reduction in the monetary value of the licenses to such an extent that bidding in the auction resulted in the Lower 700 MHz B Block failing to meet its applicable aggregate reserve price, the licenses for that block would be re-auctioned subject to population-based performance requirements. Thus, the Commission relied in part on the auction results as a final check on whether its geographic-based performance requirements were in the public interest. When the licenses were auctioned in Auction 73, the Commission received provisionally winning bids on 728 out of 734 Lower 700 MHz B Block licenses and the aggregate amount of the provisionally winning bids far exceeded the applicable aggregate

reserve price. Accordingly, the Commission reaffirms the geographic-based coverage requirement for Lower 700 MHz B Block licensees and the Commission denies Blooston's request to add an optional population-based benchmark to Lower 700 MHz B Block. For similar reasons, the Commission rejects the requests of various commenters for a population-based buildout option for EA licensees.

6. The Commission also rejects arguments that the Commission should broaden the exclusions from the Commission's geographic coverage requirements. The Commission's geographic coverage requirements already exclude government lands, and any further categorical exclusions could undermine the Commission's goals in adopting these requirements, which include taking advantage of the excellent propagation characteristics of 700 MHz spectrum to promote wireless coverage in remote and rural areas. Even with regard to bodies of water, there is a public interest benefit to wireless coverage to vessels near shore, and some level of coverage may be possible from infrastructure on land or, where relevant, through platforms or other facilities constructed out from the shore. In some cases, there may also be demand from economic activity that may benefit from access to advanced communications services over the relevant body of water. For example, for both EAs and CMAs, the Commission separately licenses the Gulf of Mexico as a service area, reflecting the Commission's recognition of the public interest in promoting the deployment of service there to help meet the growing communications needs of petroleum and natural gas providers in the area.

7. Further, the Commission already specifically considered and rejected exclusions for Tribal lands, finding that it did not want to discourage deployment to these areas. While Blooston would limit exclusion of Tribal lands to cases where a licensee had made a good faith but unsuccessful attempt to obtain Tribal government consent, the Commission see no evidence

that such consent will often be unreasonably withheld, and the Commission is concerned that an exclusion for Tribal lands may result in reduced efforts to obtain such consent and deploy in these areas.

8. In sum, the Commission concludes that the requested categorical exclusions are not appropriate, but, as mentioned in the 700 MHz Second Report and Order itself, licensees may seek waivers of the Commission's rules if they believe the circumstances in a particular area warrant relief under the Commission waiver standard. If licensees seek to obtain such waivers, the Commission urges that they make these requests as soon as possible. These requests must be well founded and not based solely on grounds of low population density. The Commission staff will consider these types of requests on a case-by-case basis.

2. Benchmarks for REAG Licenses

9. In the 700 MHz Second Report and Order, the Commission imposed a population-based performance requirement on Regional Economic Area Groupings (REAG) licensees, who occupy the Upper 700 MHz C Block. In its petition for reconsideration, RTG argues that a geographic-based coverage requirement will better ensure that REAG licensees deploy in rural areas.

10. The Commission concludes that it will retain the requirement that REAG licensees must meet the population-based benchmarks. RTG argues that the REAG approach is inconsistent with the approach the Commission took with regard to EA and CMA licenses, but there is no requirement that the performance requirements be the same for all commercial wireless services, nor even for those of a certain type. The Commission explained its determination that population-based benchmarks were better suited for the much larger REAG licenses in some detail, and there is nothing new in the record to persuade the Commission to

change this decision. This decision involved tradeoffs particular to the expectation that these licenses would lead to regional or even nationwide network deployment. Contrary to RTG's assertion, the Commission was mindful not only of the need to develop regional and nationwide networks, but also of the need to promote wireless services in less populated portions of the nation, including rural areas. To address this concern, it provided that REAG licensees must meet the population-based build-out requirements on an EA basis. RTG questions the Commission's expectation that the REAG licenses were more likely to be used to provide regional or nationwide service than the much smaller EA and CMA licenses but offers nothing to undermine the Commission's well-supported predictive judgment. Therefore, the Commission denies RTG's request that REAG licensees be required to meet a geographic-based coverage requirement.

3. Keep-What-You-Use Provisions

11. In the 700 MHz Second Report and Order, the Commission established both interim and end-of-term enforcement measures that would apply automatically in the event that licensees failed to meet the applicable benchmarks. For licensees that fail to meet the applicable interim benchmark, the Commission decided that the normal ten year license term would be reduced by two years, and the end-of-term benchmark must then be met within eight years. The Commission determined that, at the end of the license term, licensees that fail to meet the end-of-term benchmark would be subject to a keep-what-you-use rule, which would make unused spectrum available to other potential users. For those CMAs or EAs in which the end-of-term performance requirements have not been met, the unused portion of the license will terminate automatically without Commission action and will become available for reassignment by the Commission. Similarly, if a REAG licensee fails to provide signal coverage and offer service to

at least 75 percent of the population in any EA comprising the REAG license area by the end of the license term, the unused portion of each such EA in that licensee's authorization area will terminate automatically without Commission action and will become available for reassignment by the Commission.

12. The Commission further established a process governing the reassignment of licenses made available pursuant to the keep-what-you-use rules. As part of this process, the Commission provided that the licenses will be subject to an initial 30-day application period during which the original licensee may not file an application. Following this period, the original licensee is permitted to file an application for any remaining unserved area where licenses have not been issued and there are no pending applications.

13. Several petitioners seek reconsideration of the keep-what-you-use rules. Blooston requests that the Commission provide a

more precise definition of how the take-back process will work,
and what propagation model will be used.

MetroPCS requests that the Commission modify the current rule to adopt a triggered approach, under which the original licensee would only lose unserved areas if a third party files a credible application, demonstrating

a bona fide desire, and the wherewithal, to build-out the spectrum
in the unserved market, [and submits a] meaningful upfront
payment [that is] sufficiently large to deter speculators.

MetroPCS also requests that the incumbent should be allowed to participate in any auction of the unserved spectrum. Finally, Blooston and MetroPCS request that an original licensee of 700 MHz commercial spectrum subject to loss of unused license area under the keep-what-you-use rule be allowed to retain an expansion area in addition to

the area it serves at the end of its license term.

14. The Commission denies the requests to alter the keep-what-you-use rules that the Commission adopted in the 700 MHz Second Report and Order. First, the Commission disagrees with Blooston's assertion that the Commission needs to provide a more detailed explanation of how the process will work and what propagation model will be used. The Commission finds that the 700 MHz Second Report and Order already sets forth the process implementing the keep-what-you use provisions in significant detail, starting with the filing of construction notifications up through the reassignment process, and that further detail regarding the take-back process is unnecessary at this time. Further, a specific propagation model would be contrary to the flexibility that the Commission adopted. In establishing the construction notification through which licensees will demonstrate compliance with performance requirements, the Commission recognized that

demonstrations of coverage may vary across licensees, [who] will likely use a variety of technologies to provide a range of services with this spectrum.

It specifically rejected a request for a bright-line test for what constitutes sufficient signal strength, provided instead that licensees must provide the assumptions they use to create coverage maps, including the propagation model and signal strength necessary to provide service, and also delegated to the Wireless Telecommunications Bureau (Wireless Bureau) the authority to establish further specifications for filings and to determine coverage areas. The Commission sees no reason to reverse this decision, and therefore rejects Blooston's request.

15. The Commission also denies proposals that the Commission revise the keep-what-you-use rules to provide for a triggered approach, under which a licensee would not lose unused spectrum until a party seeking the spectrum first files an application for the area meeting certain

requirements for sufficiency. The Commission notes that the Commission sought comment on a triggered keep-what-you-use approach similar to MetroPCS's proposal prior to adopting the existing rule. The Commission already has application procedures to ensure that license approvals are in the public interest. Under the Commission's existing rules, before any application will be granted, the applicant must already demonstrate, inter alia, that it is legally, technically, financially, and otherwise qualified [and that a] grant of the application would serve the public interest, convenience, and necessity.

Requiring applicants seeking authorization over unused spectrum to demonstrate their bona fides in new ways above and beyond such established and familiar license application processes may in fact discourage bona fide interest in such spectrum, undermining the Commission's goal of putting this spectrum to use. Further, because these proposed revisions to the rules decrease the original licensee's risk of consequences for failing to build-out, they may lessen the incentive for the licensee to expand service into parts of its license areas by the end of its license term. The Commission also does not find persuasive MetroPCS's argument that a triggered approach reduces the prospect that forfeited unserved license areas will lie fallow in the Commission's hands. The rules already address this possibility: if no application is filed by third parties in 30 days, the original licensee is free to apply for it.

16. The Commission also rejects MetroPCS's arguments that in the event the original licensee loses its license or parts thereof through application of the keep-what-you-use rules, it should be allowed to participate in any reauction of the recaptured license areas. Under the Commission's build-out rules, the original licensee has ample opportunity to meet its build-out requirements. Further, barring the original licensee from participating during the initial reauction

of its unserved license areas is a reasonable penalty for the licensee's failure to meet its build-out requirements. This measure helps ensure that the original licensee will make all reasonable efforts to meet its performance benchmarks and that the Commission licenses spectrum to those parties that are most likely to use it. MetroPCS argues that the Commission's rule enhances the risk that the original licensee will be subject to green mail from speculators. The Commission thinks the risk of speculators acquiring unused spectrum for green mail purposes is small, however, given that the Commission also required new licensees of spectrum made available under the keep-what-you-use rule to offer service to the entire license area within one year, and provided that if they fail to meet this requirement, they lose the license automatically and are ineligible to file an application to provide service in the same area over the same frequencies at any future date.

17. Finally, the Commission is not persuaded that licensees that fail to meet the end-of-term benchmark should nevertheless retain a portion of the unserved area of their licenses as an expansion area. Parties argue that an expansion area is justified for a number of reasons including the potential need to address changes in customer demand, subsequent development of areas, population growth, and replacement of base stations, or as a buffer to avoid interference. The Commission finds, however, that permitting licensees to keep a part of their unused license areas as petitioners propose would undermine the Commission's keep-what-you-use policy goals of motivating licensees to meet their benchmarks and promoting access to spectrum that is not adequately built out and deployment of service to communities that might otherwise not receive it. Further, the rules adopted in the 700 MHz Second Report and Order provide ample opportunity for licensees to construct facilities and provide service in their licensed areas. The

Commission therefore rejects the requests for an expansion area under the keep-what-you-use rules.

4. Potential Enforcement Provisions for Failure to Build Out

18. Blooston, MetroPCS, and RTG seek reconsideration of the potential mid-term and end-of-term construction benchmarks enforcement provisions. MetroPCS and RTG contend that the Commission did not provide guidance regarding under what circumstances these potential enforcement actions might be taken and they propose various standards. Blooston argues that the Commission should repeal these enforcement provisions altogether, and that the Commission did not provide the notice required by the Administrative Procedure Act (APA) before adopting forfeitures as a potential enforcement measure.

19. The Commission is not persuaded that the Commission should adopt the modifications to the potential enforcement provisions proposed by petitioners. Although petitioners argue that their proposals would resolve ambiguity in the Commission's rules, the Commission finds that their proposals would substantially limit the Commission's enforcement options. For example, MetroPCS argues that the option of license termination at end-of-term should apply only in cases of failure to provide substantial service. It is already the case under the license renewal requirement, however, that a licensee's failure to demonstrate that it is providing substantial service results, by operation of the rules, in loss of the license. Thus, MetroPCS's interpretation would effectively eliminate license termination as a separate mechanism for enforcing the performance requirements prior to the end of a license term. In rejecting this proposal to partially conflate the substantial service and performance requirements, the Commission also notes that it has previously emphasized that the substantial service requirement at renewal is distinct from the performance requirements.

20. RTG's proposal – that a licensee should be subject to additional enforcement only if it utterly fails to construct a system – goes even further; it not only eliminates license termination as an enforcement mechanism prior to the end of a license term, but it also reduces this mechanism to a mere subset of its existing form as a license renewal requirement. Therefore, the Commission is not persuaded that any of the petitioners' proposed clarifications are consistent with the Commission's adoption of these enforcement measures.

21. The Commission also disagrees with arguments that the Commission provided no justification in support of the additional enforcement mechanisms and should eliminate them entirely. In adopting its requirements, the Commission underscored that it

expect[ed] that licensees will take these construction requirements seriously and proceed toward providing service with utmost diligence, [and concluded that] these set of stringent benchmarks . . . with effective consequences for noncompliance . . . are the most effective way to promote rapid service to the public, especially in rural areas.

The additional enforcement mechanisms thus reflect the importance of effective enforcement to achieving the Commission's goals for the 700 MHz Band and its determination that the additional mechanisms would help to ensure that enforcement would be effective. Blooston objects that the application of fines in particular is a departure from prior Commission practice with regard to enforcement of buildout requirements. However, the enforcement regime was also novel in other respects, including its adoption of the keep-what-you-use rules. Therefore, the suggestion that the Commission should eliminate one element in order to conform to prior practice is unpersuasive. The Commission also rejects the assertion that the Commission acted without notice. The Commission twice sought comment broadly on how to revise the performance requirements, and the Commission finds that adoption of measures to enforce such

requirements are well within the scope of the issues raised. The Commission also notes that the Commission is not obligated to provide APA notice to impose a forfeiture pursuant to section 503 of the Act.

22. The Commission rejects Blooston's argument that forfeitures are inappropriate because, in failing to meet performance benchmarks, a licensee does not actually violate a rule but merely exercises an option under the rules to lose a given area. The 700 MHz Second Report and Order is clear that the benchmarks are requirements, and § 27.14 imposes these buildout requirements without qualification, providing that EA and CMA licenses

shall provide signal coverage and offer service over at least 35 percent of the geographic area of each of their license authorizations no later than June 13, 2013") (emphasis added).

23. Finally, the Commission notes that the Wireless Bureau has already clarified the conditions under which licensees may be subject to reduction in license area at the interim stage. The Commission does not rule out the Wireless Bureau providing further clarification, if necessary, regarding how the potential end-of-term enforcement measures will be applied after assessing progress toward and compliance with the interim benchmarks and any necessary enforcement in connection with those benchmarks.

5. Interim Construction Reports

24. In its petition for reconsideration, Blooston requests that the Commission eliminate the interim construction reports for all small and rural licensees. The Commission is not persuaded that this modification is warranted. First, the Commission does not agree that these reports impose unnecessary burdens on small licensees. The interim construction reporting requirements strengthen the Commission's ability to monitor build-out progress during the license term. Under the circumstances, where the Commission has stressed the importance of a timely build-

out of the 700 MHz spectrum and has adopted performance requirements to meet this end, the Commission considers the information that is to be supplied in these reports to be reasonable and in the public interest. Further, the required information is readily available to licensees and can easily be reported to the Commission. The Commission merely requires licensees to provide the Commission with a description of the steps they have taken toward meeting their construction obligations in a timely manner, including the technology or technologies and service(s) they are providing and the areas in which those services are available. Accordingly, the Commission denies Blooston's request.

B. Auction-Related Issues

1. Designated Entity Eligibility for a Small Business Providing Wholesale Service

25. In its petition for reconsideration, Frontline argues that application of the impermissible material relationship rule to the C and D Blocks would be prejudicial to small businesses, especially those adopting a wholesale business model. Frontline asks the Commission to reinterpret the designated entity rules to allow small businesses with a wholesale model to maintain their eligibility for a bidding credit in the C and D Blocks. United States Cellular Corp. (U.S. Cellular) argues that the Commission properly applied the impermissible material relationship rule in the 700 MHz Second Report and Order and opposes Frontline's proposal. PISC supports making a small business bidding credit available to a licensee that agrees to wholesale 100 percent of its spectrum if the Commission imposes specific conditions to prevent warehousing while ensuring non-discrimination, transparency, and spectrum efficiency.

26. On November 15, 2007, on its own motion, the Commission waived application of the impermissible material relationship rule for purposes of determining designated entity

eligibility solely with respect to arrangements for lease or resale (including wholesale) of the spectrum capacity of the D Block license. The Commission found that the unique regulations governing the D Block license, which required the establishment of the 700 MHz Band Public/Private Partnership subject to a Commission-approved Network Sharing Agreement—together with the application of the Commission’s other designated entity eligibility requirements—eliminated for the D Block license the risks that led the Commission to adopt the impermissible material relationship rule. This waiver applied to the D Block in Auction 73, which began on January 24 and closed on March 18, 2008.

27. Frontline did not qualify to participate in Auction 73. Frontline selected only the D Block license on its short-form application, but was unable to raise the \$128.21 million necessary to make the required upfront payment for the D Block. The Wireless Bureau denied Frontline’s request for a waiver to allow it to add the A and B Blocks, which included licenses that required lower upfront payments, to its short-form application after the deadline.

28. In Council Tree Communications, Inc. v. FCC, the U.S. Court of Appeals for the Third Circuit held that the Commission’s impermissible material relationship rule in § 1.2110(b)(3)(iv)(A) had been adopted without the notice and opportunity for comment required by the Administrative Procedure Act. The court vacated the rule, but also concluded that it would be imprudent and unfair to order rescission of the auction results for Auction 73. The Commission subsequently conformed the Commission’s rules to the court’s mandate by deleting § 1.2110(b)(3)(iv)(A).

29. The Commission’s November 15, 2007 waiver of the impermissible material relationship rule rendered moot Frontline’s petition for reconsideration with respect to the D Block license, and the Commission therefore dismisses that portion of the petition as moot.

Frontline's arguments with respect to the D Block are also moot because the D Block will not be re-auctioned since Congress recently directed the Commission to reallocate the D Block spectrum for use by public safety entities. 47 U.S.C. 1411(a); Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, 126 Stat. 156 6101 (2012) (Spectrum Act). The Commission also dismisses as moot Frontline's petition to the extent it addresses designated entity status for wholesale services in the C Block, because the Third Circuit vacated the impermissible material relationship rule that is the subject of Frontline's petition. In accordance with the court's mandate the Commission has deleted the relevant provision from the Commission's Part 1 competitive bidding rules.

2. Amount of Reserve Prices

30. In order to promote the statutory objectives in 47 U.S.C. 309(j)(3), including the efficient and intensive use of the electromagnetic spectrum as well as the recovery for the public of a portion of the value of the public spectrum resource, in the 700 MHz Second Report and Order the Commission directed the Wireless Bureau to adopt and publicly disclose block-specific aggregate reserve prices pursuant to its existing delegated authority and its regular pre-auction process. The Commission concluded that the aggregate reserve prices should reflect current assessments of the potential market value of licenses for the 700 MHz Band and directed that this assessment be based on various factors, including the characteristics of the band and the value of other recently auctioned licenses, such as licenses for Advanced Wireless Services. The Commission further indicated that if the reserve price for a particular block was not met in the initial auction, a subsequent auction of alternative licenses in that block would be subject to the same applicable reserve price as the initial auction of licenses. The Commission concluded

that in the event that auction results for conditioned Upper 700 MHz C Block licenses do not satisfy the aggregate reserve price for the C Block, the Commission will offer as soon as possible licenses for the C Block without the open platform conditions.

With respect to the D Block, given the unique service rules for the Public/Private Partnership in that block, the Commission concluded that if the aggregate reserve was not met, that the Commission would leave open the possibility of re-offering the license on the same terms in a subsequent auction, as well as the possibility of re-evaluating all or some of the applicable license conditions. Based on the Commission's direction in the 700 MHz Second Report and Order, and after additional public notice and comment, the Wireless Bureau set the following aggregate reserve prices for Auction 73: Block A, \$1.807380 billion; Block B, \$1.374426 billion; Block C, \$4.637854 billion; Block D, \$1.330000 billion; Block E, \$0.903690 billion.

31. In its petition for reconsideration, Frontline argues that the reserve prices for the C and D Block licenses proposed, and ultimately adopted, by the Wireless Bureau based on the Commission's guidance in the 700 MHz Second Report and Order are arbitrarily high and, coupled with re-auction mechanisms, undermine the open access provisions for the C Block and the public safety provisions for the D Block. MetroPCS filed in opposition to Frontline's petition for reconsideration on this issue.

32. Subsequent to the Commission's order waiving the impermissible material relationship rule with respect to leasing or resale of the spectrum capacity of the D Block license, Frontline filed an amendment to its petition for reconsideration withdrawing its argument that the reserve prices were set arbitrarily high and stating that it no longer advocates altering the reserve prices for the 700 MHz auction.

33. In light of Frontline's withdrawal of its arguments with respect to the Auction 73 reserve prices, the Commission dismisses this portion of Frontline's petition for reconsideration.

3. Re-Auction Procedures

34. MetroPCS asks the Commission to reconsider two issues related to the re-auction of 700 MHz licenses contemplated by the 700 MHz Second Report and Order. First, MetroPCS requests reconsideration of the Commission's determination that, for any 700 MHz re-auction, the auction of alternative licenses would be subject to the same applicable reserve prices as the initial auction of licenses. Second, MetroPCS requests reconsideration of the Commission's determination that both the initial and any required follow-on auction would be treated as a single auction for purposes of the application of § 1.2105(c), the rule prohibiting certain communications. The prohibition generally applies to auction applicants during the time period between the deadline for filing short-form applications and the deadline for winning bidders to make their down payments. Treating the initial auction and subsequent auction of alternative licenses as a single auction would have kept the prohibition in place for all applicants to participate in the first auction until the down payment deadline for the second auction, regardless of whether they were applicants to participate in the second auction. CTIA – The Wireless Association (CTIA), U.S. Cellular, Blooston, and RTG support MetroPCS's proposal that the Commission allow applicants that do not wish to participate in the second auction, to opt out of the second auction to avoid continued application of the rules prohibiting certain communications.

35. The winning bids in Auction 73 for the Lower 700 MHz A, B, and E Block licenses and the Upper 700 MHz C Block licenses exceeded the aggregate reserve prices for those blocks; however, the provisionally winning bid for the Upper 700 MHz D Block did not

meet the applicable reserve price. On March 20, 2008, two days after the close of Auction 73, the Commission issued an order electing not to re-offer the D Block license immediately in Auction 76 in order to allow additional time to consider options for this spectrum. More recently, Congress directed the Commission to reallocate the D Block spectrum for use by public safety entities. As a result, the D Block spectrum will not be assigned by auction for commercial use.

36. Because the Commission decided not to re-auction the D Block license immediately, and Congress has since directed the Commission to reallocate the D Block for public safety use, the re-auction of the D Block has not occurred and will not occur. As a result, the reserve price for any re-auction of the D Block is now irrelevant. In addition, the issue is also moot as to the other blocks because the bids in those blocks exceeded the applicable reserve prices, thereby obviating the need for any follow-on auctions. Accordingly, the § 1.2105(c) prohibition on certain communications, as applied to the Auction 73 applicants for licenses in those blocks, ended at the down payment deadline for that auction. The Commission therefore dismisses as moot MetroPCS's petition for reconsideration of these issues related to the re-auction.

4. Prohibition of Certain Communications

37. In its petition for reconsideration, PISC requests that the Commission declare that two or more bidders working together to block another bidder from winning any licenses would violate § 1.2105(c) of the Commission's rules, which prohibits certain communications. PISC argues that in the 700 MHz Second Report and Order, the Commission failed to address PISC's request to clarify

whether a conspiracy to block a bidder from winning any licenses, rather than a conspiracy to distribute licenses or set the price for licenses,[violates section 1.2105(c). PISC argues that] a conspiracy among bidders to block potential rivals—even if they plan to bid aggressively against one another—thwarts the goals of Congress in distributing licenses via auction.

38. The Commission denies PISC’s request for a declaratory ruling on the application of § 1.2105(c) to certain types of activity by bidders who work together. The Commission has discretion whether to issue a declaratory ruling, and rather than address PISC’s request in this proceeding, the Commission thinks it’s best to address such issues as they arise. The declaratory ruling PISC seeks would likely be of very limited benefit given the hypothetical general circumstances it describes. The Commission also notes that regardless of compliance with § 1.2105(c), auction applicants remain subject to the antitrust laws, which are designed to prevent anticompetitive behavior in the marketplace, and conduct that is permissible under the Commission’s rules may be prohibited by the antitrust laws.

5. Anonymous Bidding

39. In the 700 MHz Second Report and Order, the Commission concluded that the public interest would be served by the use of anonymous bidding procedures in Auction 73. The Commission found that the record indicated that implementing anonymous bidding procedures would reduce the potential for anti-competitive bidding behavior, including bidding activity that aims to prevent the entry of new competitors. The Commission noted that its decision did not rely upon studies conducted by Gregory Rose and submitted by PISC, even though those studies were offered as evidence that anonymous bidding would be beneficial. As described in detail in footnotes 644 and 645 of the 700 MHz Second Report and Order, the Commission did not find the Rose studies persuasive for a variety of reasons.

40. PISC does not challenge the Commission's decision to employ anonymous bidding in Auction 73, but argues that the Commission's conclusions regarding the merits of the Rose studies were inaccurate and arbitrary, and that footnotes 644, 645, and 655 (which relies upon footnotes 644 and 645) should be vacated. PISC adds that given the Commission's decision to adopt anonymous bidding, it was unnecessary and unusual for it to address the merits of the Rose studies in footnotes.

41. The Commission denies PISC's request to vacate the footnotes describing potential flaws in the Rose studies. PISC's petition for reconsideration presents additional information regarding the Rose studies that provides useful context but does not change the validity of the footnotes with respect to the studies as filed. Footnotes 644, 645, and 655 in the 700 MHz Second Report and Order explain that the Commission's adoption of anonymous bidding, although advocated by the Rose studies, did not depend upon those studies.

C. Spectrum Eligibility

42. Frontline, PISC, and RTG filed petitions requesting that the Commission reconsider its decision not to impose spectrum aggregation limits. Frontline requests that the Commission implement a spectrum screen that would trigger increased review of certain long-form auction applications for anticompetitive effects, similar to the screen applied to merger and acquisition transactions. PISC proposes that the Commission adopt a rule prohibiting the winner of the Upper 700 MHz D Block license from holding Upper 700 MHz C Block licenses and vice versa. RTG proposes an interim, geographically based spectrum cap applicable specifically to the 700 MHz auction.

43. In the 700 MHz Second Report and Order, the Commission considered and declined to adopt license eligibility restrictions, including rules that would have excluded ILECs,

incumbent cable operators, and large wireless carriers from holding licenses in the 700 MHz Band. The Commission provided numerous reasonable justifications for its decision, and the Commission finds that Frontline, PISC, and RTG offer no new evidence warranting the Commission's reconsideration of the Commission's decision on spectrum aggregation limits at the initial licensing stages of the 700 MHz Band. Further, the Commission notes that the appropriate policies regarding spectrum holdings going forward are the subject of a separate and pending rulemaking proceeding, and any further consideration of such issues is therefore more appropriately considered in that context. Therefore, the Commission denies Frontline's request for heightened review of certain long-form applications, and the Commission denies PISC's and RTG's requests that the Commission impose a spectrum cap. Finally, the Commission concludes that Congress's direction that the Commission reallocate the D Block spectrum to public safety use has rendered moot requests by Frontline and PISC that the Commission not permit the C Block auction winners to hold a D Block license or D Block auction winners to hold C Block licenses.

D. Lower 700 MHz A Block Wholesale Requirement

44. In its petition for reconsideration, NTCH, Inc. (NTCH) argues that the Commission should reform the current Universal Service Funding (USF) system by requiring Lower 700 MHz A Block licensees to provide service on a discounted wholesale basis to designated Eligible Telecommunications Companies. CTIA and U.S. Cellular oppose NTCH's proposal arguing, among other assertions, that the proposal is outside the scope of what can be granted on reconsideration of the 700 MHz Second Report and Order.

45. NTCH presents a new proposal to impose a discounted wholesale obligation on Lower 700 MHz A Block licensees and argues that the Commission should adopt it as a means

of reforming the current USF system, but does not challenge the Commission's refusal, in the 700 MHz Second Report and Order, to adopt wholesale requirements for the Upper 700 MHz C or D Block licensees. The Commission agrees with CTIA and U.S. Cellular that the USF issues raised in NTCH's proposal are outside the scope of this proceeding and therefore denies NTCH's petition. The Commission notes that, as with other 700 MHz licensees, A Block licensees have the flexibility to provide wholesale services if they choose to based on their determination of market need.

E. First Amendment Analysis of Open Platform Rule

46. In the 700 MHz Second Report and Order, the Commission required licensees in the C Block

to allow customers, device manufacturers, third-party application developers, and others to use or develop the devices and applications of their choice, subject to certain conditions[.]

The Commission rejected Verizon Wireless' arguments that the open platform rule applicable to the Upper 700 MHz C Block violates the First Amendment, finding that even if the open platform rule did implicate the First Amendment, it withstands the applicable intermediate scrutiny test.

47. In late 2007, Verizon Wireless and CTIA each filed and then withdrew lawsuits in the D.C. Circuit Court challenging the open platform requirements on the grounds that they violated the First Amendment. Prior to Verizon Wireless's withdrawal of its petition for review from the D.C. Circuit Court, PISC filed its petition for reconsideration with the Commission requesting, in pertinent part, that the Commission clarify that

the proper framework for Verizon's First Amendment claim remains the 'rational basis' flowing from the 'scarcity rationale' adopted by the Supreme Court in NBC v. U.S.

48. In light of the withdrawal of the Verizon Wireless and CTIA First Amendment challenges to the open platform rule, PISC's request for clarification of the proper legal framework for addressing Verizon Wireless's withdrawn challenge is moot, and the Commission accordingly dismisses PISC's petition for reconsideration as such, to the extent the petition requested such clarification.

F. Open Platform Requirements for the C Block if the Reserve Price is Not Met

49. In its petition for reconsideration, Frontline argues that stripping the C Block of the open platform conditions in the event of a re-auction would be contrary to the public interest and would create perverse incentives for bidders. The C Block auction was successful and has been completed, rendering any discussion of an unsuccessful auction and the terms of a re-auction of the C Block moot. Therefore, the Commission dismisses Frontline's petition for reconsideration to the extent that it seeks the Commission to reconsider the conditions of a re-auction of the C Block.

G. 700 MHz Public/Private Partnership

50. Several of the pending petitions in this proceeding seek reconsideration or clarification of various aspects of the regulatory requirements adopted by the Commission to effectuate and govern the Public/Private Partnership between the Upper 700 MHz D Block licensee and the future licensee of the 700 MHz public safety broadband spectrum (the Public Safety Broadband Licensee or PSBL). The Commission finds that the directives in the Spectrum Act regarding the D Block render moot the requests for reconsideration or clarification of the Commission D Block commercial service rules, and the Commission therefore dismisses these requests.

H. Narrowband Relocation

51. Commonwealth of Virginia (Virginia) and Pierce County Public Transportation Benefit Area Corporation (Pierce Transit) filed petitions seeking reconsideration of certain aspects of the decisions on public safety narrowband relocation.

52. The 700 MHz Second Report and Order assumed that the D Block would be licensed to a commercial provider that would be responsible, up to a cap, for the costs of the narrowband relocation. Now that the D Block has been reallocated for public safety services pursuant to the Spectrum Act, the approach that the Commission established for effectuating the consolidation of the narrowband channels cannot be implemented, and the Commission must revisit the entire narrowband relocation process (including elements such as those relating to reimbursement and the timing of relocation), which the Commission will accomplish by initiating a new rulemaking proceeding where the Commission can address more comprehensively what rules need to be adopted, deleted, or modified to implement the Spectrum Act. Accordingly, the Commission dismisses the petitions for reconsideration by Virginia and Pierce Transit as moot.

III. ORDERING CLAUSE

53. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 302, 303(e), 303(f), 303(g), 303(r) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 302, 303(e), 303(f), 303(g) and 405, that the petitions for reconsideration of Blooston Rural Carriers, NTCH, Inc., and Rural Telecommunications Group, Inc. ARE DENIED; the petitions for reconsideration of AT&T, Inc., Commonwealth of Virginia, Cyren Call Communications Corporation, and Pierce County Public Transportation Benefit Area Corporation ARE DISMISSED; and petitions for reconsideration of Frontline Wireless, LLC, MetroPCS Communications, Inc., and Ad Hoc Public Interest Spectrum Coalition ARE DENIED IN PART and DISMISSED IN PART as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary.

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